No. 13051

United States
COURT OF APPEALS
for the Ninth Circuit

OREGON-WASHINGTON BRIDGE COMPANY,
Appellant,

vs.

TUG "LEW RUSSELL, SR.", and CRANE BARGE NO. 25, RUSSELL FAMILY, INC., RUSSELL TOWBOAT AND MOORAGE COMPANY,
Appellees.

BRIEF OF APPELLEE, RUSSELL TOWBOAT AND MOORAGE COMPANY, AS RESPONDENT IN PERSONAM AND CLAIMANT OF TUG "LEW RUSSELL, SR."

Upon Appeal from the District Court of the United States for the District of Oregon.

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STATEMENT

The Opinion and Findings of Fact of the Trial Judge, Honorable Gus J. Solomon, leave little more to be said. They amply support his conclusion that the Tug "Lew Russell, Sr." and her owner, Russell Towboat and Moor-

age Company, were in no way liable for the damage to the Bridge.

That is enough to satisfy this appellee. This appellee is not seeking damages from the Bridge; consequently, it is immaterial to this appellee whether the Bridge was to blame or not. We think it clearly was, and that its fault was the proximate and real cause of the accident. This was held by the Court, and is ably demonstrated by proctors for Russell Family, Inc., owners of Crane Barge No. 25, whose brief on that point we adopt. But we really are not so much concerned with that. What we are concerned with is to show that the claim of the Bridge against this appellee for damages to the Bridge is unfounded; for the reason that the Tug "Lew Russell, Sr." was without fault. And as we have said, the Opinion and Findings of the Trial Court, amply supported by the evidence, demonstrate this clearly and relieve us from extended argument.

THE FACTS

There is no material disagreement about the facts. The White Salmon-Hood River Bridge across the Columbia River is high enough above the water to permit the passage of most river craft without lifting the draw span. If, however, some craft high enough to require lifting of the draw desires to go through the Bridge, it is the practice or regulation to give the Bridge twelve hours' advance notice so that the bridge tender (Mr.

Adams) can be on hand to lift the span at the expected time. And because the draw span is electrically operated, it was the practice for Mr. Adams to be accompanied by an electrician from shore,—in this case Mr. Benson. The electrical current is furnished from the shore by a public utility district of the State of Washington.

On this particular occasion—June 13th, 1950—the Tug "Lew Russell, Sr.", with Crane Barge No. 25 in tow approached the Bridge from the down-river side. The tug and tow had departed from Vancouver, Washington, and had given the required twelve hours' advance notice that it would be approaching the Bridge in the morning and would require the span to be lifted. Consequently, Mr. Adams, the bridge tender, and Mr. Benson, the electrician, were on the Bridge awaiting the tug and tow and ready to lift the span for their passage. The tug and tow arrived below the Bridge at about 11:30 A.M. and when about a quarter of a mile from the Bridge, the tug stopped her engines and proceeded to drift, and at the same time Mr. Adams, the bridge tender, recognizing that this was the tug and tow of which notice had been given, without waiting for any signal, raised the draw span of the Bridge 13½ feet—that is, 13½ feet above the deck of the bridge, its ordinary position. At this point the electric power failed; consequently no further lifting was possible, nor could a warning blast or whistle be given because the whistle was operated by the same electrical current which had failed.

The U. S. Engineers' Regulations do not require the Bridge to give any signal at all inviting the approaching craft to come on. The pilot of the tug, therefore, seeing that the span was well lifted and had come to a stop, judged that the Bridge was ready for him to pass through. The Trial Judge has found on all the evidence that he was rightly justified in this assumption, and we think the evidence, as well as the legal authorities which we shall cite, clearly show that he was. He therefore started up his engines and proceeded slowly toward the Bridge at a speed of about 1½ miles per hour. It appeared to him (and to his co-pilot, who, though not on duty, was watching) that there was sufficient clearance to go through, until he got within a few feet of the Bridge, when he saw that the tip of the whirlly crane, which was on Barge No. 25, was going to hit the span. (It failed to clear by only 2 or 3 feet.) The pilot thereupon reversed his engines, but too late to avoid the contact and the tip of the boom rode up over the railing of the draw span a ways and was later pulled free. A photograph taken very shortly after, and introduced in evidence by the libelant, shows the tug and tow lying in the river just below the bridge and the general position of the crane in relation to the Bridge.

ARGUMENT

I.

The "First Point" in appellant's brief is that this is a trial de novo. That is so well understood and the rule

so well settled that the Trial Court's Findings of Fact, when supported by evidence, will not be disturbed, that we do not discuss it.

II.

The "Second Point" is that the lack of an auxiliary whistle or an emergency whistle on the Bridge did not contribute to the accident and the damages complained of.

This has been ably answered by proctors for Crane Barge No. 25 and does not concern us, except that we think it is apparent that the lack of the auxiliary whistle or other emergency whistle was, as the Court found, the real and proximate cause of the accident, and this is a cumulative reason, in addition to the lack of any negligence on the part of the tug, why the tug should not be held liable. But on this point of the auxiliary whistle or emergency whistle, we adopt the argument of proctors for Crane Barge No. 25 and say no more about it.

III.

Appellant's "Point Three" is that appellees are not in a position to "rely on the proposition that in the absence of proper warning a vessel approaching a bridge over navigable waters has the right to assume that the bridge will be timely opened for traffic."

The proposition on which we rely is supported both by reason and authority. An often-quoted case is *Clement v. Metropolitan West Side Electric Railway Company*, 123 F. 271 (7 C.C.A., 1903). In this case a

steamer, having signaled for the opening of the Metropolitan Bridge across the Chicago River in the nighttime, proceeded toward the bridge in expectation that it would open, but through some mechanical failure the bridge did not open and the steamer collided with it. There was a red signal light or lights on the bridge, but "no signal or warning to the approaching boat was given with respect to the difficulty, *otherwise than by the red signal light or lights upon the bridge*". (The Court's statement of the facts at page 272.) The Court, after stating the facts, then said:

> "A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge, to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to the effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been

swung or raised and locked, and to critically examine the situation before proceeding (City of Chicago v. Mullen, 54 C.C.A. 94, 116 Fed. 292), but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened (Manistee Lumber Company v. City of Chicago (D.C.) 44 Fed. 87; Central Railroad Company of New Jersey v. Pennsylvania Railroad Company, 8 C.C.A. 86, 59 Fed. 192), when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

This holding has been quoted with approval or substantially paraphrased in the following cases:

The Bellatrix, 114 F. 2d 1004, 1006 (3 C.C.A., 1940);

The Russel No. 16, 25 F. Supp. 1013, 1017 (S.D. N.Y., 1938);

The Majestic, 80 F. 2d 879, 890 (4 C.C.A., 1936);

Newton Creek Towing Co. v. City of New York, 47 F. 2d 883;

The Kard, 38 F. 2d 844, 847 (E.D. Pa., 1930);

The Louise Rugge, 234 F. 768, 771 (D. N.J., 1916);

O'Keefe v. Staples Coal Co., 201 F. 135, 143 (D. Mass., 1911).

In *The Louise Rugge,* supra, the mast of a lighter in tow of a tug collided with the draw span of a bridge. The Court said:

"Moreover, as the draw span had stopped in its rise before the tug and tow proceeded, the captain

of the tug was justified by reason of that fact, as well as by his observation of the light on the draw, in proceeding. It is not the duty of the captain of a tug in charge of a tow, in passing up a river across which there are a number of bridges, to examine every draw to see that the same has been fully and sufficiently operated by those whose duty it is to operate the same. In City of Chicago v. Mullen et al., 116 Fed. 292, 54 C. C. A. 94, it is suggested by Judge Jenkins, in delivering the opinion of the Court of Appeals of the Seventh Circuit, that common sense does not demand—

> 'that vessels navigating the river shall heave to at each of the numerous bridges that span the river, and critically examine whether the bridge has been swung and whether it has been locked.'

"Nor is it required to delay proceeding until it receive some special signal from those in charge of the bridge to proceed. The usual customary signal is all that is required; and, if the only signal to proceed is the raising of the draw, the captain of the tug cannot be deemed negligent if he proceeded, although those in charge of the draw be required by law to give some other signal. . . ." pp. 770-771.

In *The Kard,* supra, the derrick barge Leo in tow of the tug Kard collided with a bridge, as in this case. The derrick boom rose seventy feet from the deck. The draw of the bridge was of the jack-knife type, capable of being raised to an angle of eighty-four degrees. The Kard signaled the bridge to open. The bridge tender gave no signal in response, but raised the draw only fifty degrees from the horizontal, instead of the maximum eighty-five. "The master of the Kard, seeing that the bridge was being raised, proceeded to enter the draw, whereupon the boom of the Leo was brought into collision with the

raised draw-span, and, as a result, the derrick was broken, the 'A' frame was knocked down, the house was crushed, and the barge otherwise damaged". pp. 845-6. If the span had been raised to eighty-five degrees there would have been no collision.

The Court, after quoting *Clement v. Metropolitan West Side Electric Railway Company,* supra, then said:

> "The act of raising the draw-span, after the Kard had given the statutory signal, was an invitation for the tug with her tow to come on through the span, assuming that her safe passage had been given, . . . (citing The Louise Rugge)." p. 847.

In *The Majestic,* supra, a tug and tow collided with a bridge. The facts are stated by the Court as follows:

> "When the vessels were about 2,000 feet from the bridge, the master of the tug, admonished by a sign located nearby on the side of the canal, gave a three-blast signal, indicating that he desired to pass through the draw. At that time a red light was showing on the bridge. There was no response to the signal, the bridge did not open, and the red light remained fixed. About this time, the tug stopped her engines and drifted with the tide at a speed of one and a half to three miles per hour for a distance of 200 feet, when a second three-blast signal was sounded. A signal of one blast was then sounded by the bridge tender, which was the usual notice to pedestrians that the lift span would be raised in not less than one minute. As the master of the tug had taken her through the canal 287 times in three years and a half, he doubtless understood the meaning of this signal. The draw of the bridge rises at the rate of one foot a second, and an elevation of seven feet would have cleared the vessels. On this occasion, however, the bridge was

frozen, and the bridge tender was unable to raise it until after the collision had taken place; but he gave no notice of this difficulty until the flotilla was too close to be stopped. Then he sounded a danger signal of two blasts and called out that he could not raise the draw; but it was too late and the barge, being deeply loaded, drifted ahead of the tug into contact with the bridge.

"It would have been practicable for the tug when within 1,000 feet of the bridge, to have held the barge in check against the tide until the green light on the bridge appeared; but the master of the tug did not consider that there was any danger because he had received no notice from the bridge to stop and many times before his vessel had gotten close to the draw before it was raised. Even when the danger signal was given by the bridge tender, there would have been time to have raised the bridge for the safe passage of the vessels if it had been in good order." P. 880.

The Court, after quoting *Clement v. Metropolitan,* supra, and citing many other cases, held the bridge negligent and absolved the tug, even though the red danger signal light was showing from the bridge. On that point the Court said:

"It is insisted, however, that the master of the tug was negligent in proceeding in face of the red light displayed upon the bridge after he had signaled for the opening. This light, under the rules, was to be displayed at night to indicate that the draw was closed, and it served this purpose as the tug approached the bridge in the darkness of the December morning. But it did not signify that the draw would not open in due time in response to the opening signal. On the contrary, the sounding of one blast by the bridge to warn vehicular traffic indicated to the master of the tug that the bridge

> tender had been aroused and intended to open the draw promptly. We think that under these circumstances the master was justified in assuming that the draw would be opened in time for safe passage, as had been the case on many similar occasions in the past. As the cited cases show, the master of a vessel, having duly signaled for the draw may properly proceed at slow speed on the assumption that the bridge will open, until it appears by proper warning or reasonable view of the situation that it will not. See Clement v. Metropolitan West Side El. R. Co., Monroe v. City of Chicago and Conklin v. City of Norwalk, supra. Affirmed." pp. 881-2.

But counsel insist that these cases are not applicable because in them the tug had given a signal to the drawbridge to open, whereas in our case no such signal was given.

> "The law does not require the doing of a vain thing."

When the tug "Lew Russell, Sr." and her tow came to a virtual stop a quarter of a mile below the Bridge, and Adams, the bridge tender, recognized them as the tug and tow of which he had been notified, and for which he was waiting, and proceeded to raise the draw without waiting for a signal from the tug, the situation was exactly the same as if a signal had been given. The tug and tow were there, Adams knew they wanted to come through. Without waiting for any signal from the tug, he raised the draw and invited the tug to come on. The blowing of the signal by the tug then would have been a vain thing. As the Trial Court properly held, the failure to blow it was entirely immaterial.

But, counsel says, the tug did not wait for any "affirmative sign" from the Bridge that it was not in readiness to permit the passage of the tug and tow. It is a sufficient answer to this that the U. S. Engineers' official regulations governing this Bridge did not require any "affirmative sign." Navigators are entitled to govern themselves according to the official regulations. They did so here. It is true there was some testimony on behalf of the Bridge that though no regulation required it, it was the "practice" of the Bridge, on receiving a signal from a tug desiring passage, to blow an answering whistle signifying assent. But the testimony on behalf of the tug was that its navigators and owners, in going through the Bridge on previous occasions, had never heard any such answering whistle and knew of no such practice. And it was admitted by libelant's own witness Benson that, so far as he knew, no notice had ever been given to Russell Towboat and Moorage Company of the alleged practice.

Counsel also somewhat weakly suggests that the tug was not "proceeding prudently." It is hard to know what counsel can mean by this. The tug had come to a practical stop, and then when the draw was open, proceeded slowly and under perfect control at a speed of one and one-half miles per hour. Nothing more need be said on this.

IV.

Appellant's "Point Four" is that the tug should have had a lookout.

It is a sufficient answer to this that none of the cases whose opinions we have quoted even mentions the necessity for a lookout. On the contrary, they all proceed on the premise that it is up to the bridge tender to lift his span in time, and sufficiently high enough, for the approaching vessel to pass; and he is the sole judge of *when* to lift, how *high* to lift it and whether to lift it still *higher*. He is the man most nearly *on a level* with the top of the approaching tug and tow and therefor able to judge the clearance and is in complete control of the machinery. As said in *The Louise Rugge,* 234 Fed. 768, at page 770:

> "It is not the duty of the captain of a tug in charge of a tow, in passing up a river across which there are a number of bridges, to examine every draw to see that the same has been fully and efficiently operated by those whose duty it is to operate the same."

In some of the cases cited, the span was not even lifted at all. In others it was not lifted high enough. But in all cases it was held that the tug was justified in approaching in the expectation that it would lift in time. So here. If, as the tug approached, it seemed as if additional clearance might be necessary, that would be up to the bridge tender, and the tug would, in the absence of some danger signal or warning, be justified in proceeding ahead in the expectation that the span would be lifted higher. The authorities cited so hold.

As the Trial Court said in his oral opinion:

> "I find that the tug had the right to assume that the span was raised high enough, and that it therefore had the right to proceed."

We believe the foregoing is a complete answer to counsel's contention. But we observe further that if a lookout had been stationed, as he suggests, on the forward end of the Crane Barge, such lookout would have been directly underneath the top of the boom looking vertically upwards at it, and we think in about the worst position possible to get any "sight" which would have enabled him to tell whether it would pass through the bridge or not. Neither will it escape the Court's attention that the day was bright and clear; the navigation was in a smooth river; and the pilot of the tug could see plainly everything ahead of him,—the bridge, the lifted draw span, Crane Barge 25, and the whole of its derrick boom including the top.

The attempt of the bridge tender Adams to wave his hat at the tug after the power failure we dismiss as hardly worthy of notice. He was admittedly on the East, or upstream, side of the Bridge, with the steel structure of the Bridge intervening between him and the tug, and as he himself testified,—"There was some bridge members there that it was pretty hard or impossible to see me." Ap. 83. As the Trial Court said in his opinion, this attempt of the bridge tender, while commendable, did not relieve the Bridge from liability for its failure to maintain some adequate auxiliary signal, nor did it make the tug ~~tow~~ negligent for its failure to observe such hand signal. Ap. 41.

CONCLUSION

We submit that the Bridge was at fault for failure to provide some auxiliary whistle in event of a power failure; that the tug was without fault; and that the decree should be affirmed.

Respectfully submitted,

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